No. 87-1555

IN THE

Supreme Court Of The United States

October Term, 1988

JAMES H. BURNLEY IV, SECRETARY
DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

V.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE PRIVATE TRUCK COUNCIL OF AMERICA, INC., THE NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION AND THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF REVERSAL

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This brief is respectfully submitted on behalf of the Private Truck Council of America, Inc., the National-American Wholesale Grocers' Association, and the American Petroleum Institute, as *amici curiae*. Pursuant to Rule 36.2 of the Rules of this Court, *amici* have obtained and filed the written consents of each of the parties to the filing of this brief. The *amici* support the position of the Petitioners in this case and urge reversal of the decision below.

The sole question presented to the Court is whether regulations promulgated by the Federal Railroad Administration (FRA) -- mandating blood and urine tests of railroad employees who are

involved in certain train accidents and fatal incidents and authorizing breath and urine tests after certain accidents, incidents, and rule violations -- violate the Fourth Amendment on the ground that they do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to the testing.

INTEREST OF AMICI CURIAE

The Private Truck Council of America, Inc. ("PTCA") is an independent national organization representing the interests of non-transportation companies that operate proprietary truck fleets pursuant to and in furtherance of their non-transportation primary business endeavors. PTCA numbers approximately 1,800 members, comprising a cross-section of manufacturing, processing and retailing industries. Its membership includes a substantial number of Fortune 500 companies, as well as many smaller concerns. Trucks transport over three quarters of the Nation's freight and private carriage is clearly recognized as the largest single component of the trucking industry.

The National-American Wholesale Grocers' Association ("NAWGA") is a national trade association representing nearly 400 independent wholesale grocers and food service distributors. NAWGA member companies employ approximately 350,000 people nation-wide. These companies, both large and small, supply grocery products and provide a wide array of services to retail grocery stores, hospitals, schools, restaurants and other food service establishments throughout the United States. Marketing products from nearly 1,200 separate distribution centers, NAWGA member companies account for more than $65 billion of the Nation's grocery product volume and 1/3 of the grocery supply distributed nationally. NAWGA's food service division, the International Foodservice Distributors' Association, represents member firms who sell annually over $17 billion in food and related products to the institutional, away-from-home foodservice market. NAWGA's members have historically maintained interstate proprietary trucking fleets, and have more than 20,000 commercial motor vehicles on the highways during every business day.

The American Petroleum Institute ("API") is a national trade association representing over 200 companies involved in all sectors of the petroleum industry, including the refining, marketing and transportation of petroleum and petroleum products. The delivery of the most familiar of these, gasoline, accounts for more than 40,000-50,000 truck movements a day to every city and town in the United States or more than 15 million truck deliveries a year. Gasoline represents the most frequently transported hazardous material, accounting for almost one-half of all hazardous materials transported by highway. The sheer volume of gasoline delivered by tank truck, over 110 billion gallons per year, makes public exposure to and familiarity with gasoline higher than any other hazardous material. To supply the 160,000 retail gasoline facilities nationwide, cargo tank trucks pick up product from some 1,855 marketing terminals, which are supplied by barge or pipeline, and over 11,000 petroleum bulk plants located in all 50 states. The gasoline distribution network, for all intents and purposes, operates on a twenty-four hours a day, seven days a week schedule. Private companies (such as petroleum marketers and oil companies) and common carriers own some 130,000 tank trucks and trailers to transport hazardous materials such as flammable and combustible liquids. About 57,000 of these tank trucks are used to transport products such as gasoline, diesel and home heating oil. Railroad tank cars are also used extensively by petroleum industry firms, which transport both intermediate and finished products by rail.

In no area of American life is the threat posed by abuse of drugs and alcohol of greater concern than in commercial transportation activities involving the movement of freight or passengers. *Amici* are intimately familiar with these issues, since they represent member firms that possess substantial economic interests in the safety of transportation operations, both in their roles as motor carriers and as shippers and receivers of commercial goods. These corporations employ many thousands of workers in their truck fleets and related activities, and many transport materials which are classified as hazardous under a range of regulatory programs. The Court's resolution of the instant case is of particular concern

to the *amici* in light of pending rulemaking activities at the Department of Transportation,[1] and legislation currently under consideration in the Congress[2] that would establish drug testing requirements for motor carriers, including provisions which are comparable to the regulations challenged by Respondents.

SUMMARY OF ARGUMENT

The FRA's detailed regulations, which are intended to prevent accidents, injuries and casualties in railroad operations that result from impairment of employees by alcohol or drugs, 49 C.F.R. Part 219, do not violate the Fourth Amendment. For several reasons, a showing of individualized suspicion of drug or alcohol impairment is not required under the Fourth Amendment prior to conducting blood or urinalysis tests on transportation industry employees involved in major train accidents, fatal incidents or serious rule violations. First, the safety-related activities of railroad personnel are pervasively regulated, so the normal requirements of a warrant and probable cause for searches do not apply to drug tests of railroad employees involved in accidents or rule infractions. In addition, such searches are reasonable, in that testing under the FRA regulations is both justified at its inception and reasonably related in scope to the circumstances which justify the intrusion. Moreover, the FRA rules reflect the important governmental interest in promoting the sober operation of the Nation's railroads which outweighs individual Fourth Amendment interests raised by toxicological testing.

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[1] On June 14, 1988, the Federal Highway Administration of the Department of Transportation published a Notice of Proposed Rulemaking concerning regulations which would mandate chemical testing of interstate or foreign commerce drivers for the use of drugs in several circumstances. 53 Fed. Reg. 22268 (1988).

[2] On April 15, 1987, the Senate Committee on Commerce, Science and Transportation reported S.1041, a bill which provided for testing for alcohol or controlled substances by the operators of aircraft, railroads and commercial motor vehicles. The bill was approved by the full Senate by a vote of 88-5 on October 30, 1987, and is now pending in a House-Senate conference.

ARGUMENT

I. A SHOWING OF "PARTICULARIZED SUSPICION" OF DRUG OR ALCOHOL IMPAIRMENT IS NOT REQUIRED UNDER THE FOURTH AMENDMENT SINCE RAILROAD EMPLOYEES ARE SUBJECT TO STRICT REQUIREMENTS IN A PERVASIVELY REGULATED INDUSTRY

For purposes of this brief, *amici* assume that screening for drug and alcohol use by urinalysis, breath and blood tests constitutes a search under the Fourth Amendment to the United States Constitution. The sole question before the Court is whether FRA regulations which require that employees be subjected to toxicological tests after any major train accident, any impact accident, or any fatal train incident, or when employees engage in certain rule infractions, violate the Fourth Amendment on the ground that they do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to the testing.

The Fourth Amendment provides that the right of the people to be secure against unreasonable searches and seizures shall not be violated. U.S Const., Amend IV. Except for certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless authorized by a valid search warrant. *O'Connor v Ortega*, 107 S. Ct. 1492, 1499 (1987).

Warrantless inspections are permitted under the Fourth Amendment where administrative searches of closely regulated industries are involved. *O'Connor v Ortega*, *supra*. In *New York v Burger*, 107 S.Ct. 2636, 2643-44 (1987), the Court outlined three criteria which must be met for a warrantless search of a closely regulated industry to be deemed reasonable. First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. Second, the warrantless inspection must be necessary to further the regulatory scheme. Third, the statutory inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. In his dissent in the case below, Judge Alarcon fully evaluated the FRA regulations, apply-

ing the *Burger* criteria, and correctly concluded that the toxicological testing program established under the regulations satisfies the three-prong test. The *amici* urge the Court to apply the administrative search exception to drug testing without particularized suspicion in transportation activities which are subject to extensive government regulation.

a. The Government Interest Is Substantial

The government's substantial interest in assuring railroad safety by discouraging drug or alcohol use on the job is not really in question. The court below erred in concluding that the administrative inspection exception does not apply to the FRA regulatory scheme because "the vast bulk of [railroad] safety legislation is directed at owners and managers of railroads, not their employees." *Railway Labor Executives' Ass'n v Burnley*, 839 F.2d 575, 585 (9th Cir 1988), *cert granted*, No 87-1555 (June 6, 1988). This conclusion is at odds with long-recognized principles of common carriers' liability for acts of their employees. It is axiomatic that owners and managers of railroads do not involve themselves in the day-to-day operation of the railroad system, yet retain ultimate responsibility for the safety of the railroads. Railroad safety is pervasively regulated, and employers, under general principles of agency law, are typically liable for the acts of their employees. Thus, train accidents, releases of hazardous materials, and similar events caused exclusively by the carelessness of railroad employees, are generally imputed to the employer for purposes of liability. Thus, even assuming that most railroad safety regulations are directed at owners and managers, not employees, this should in no way alter the determination that railroad safety is pervasively regulated for purposes of assessing the constitutionality of employee drug and alcohol testing requirements.

However, there is a long history of federal regulation of the conduct of railroad personnel for the purpose of enhancing safety on the rails. Maximum working hours and safe work practices have been mandated by the federal government for railroad employees for many years. As Judge Alarcon noted, "An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of

alcohol or drugs." *Railway Labor Executives' Ass'n v Burnley*, 839 F.2d at 593 (Alarcon, J., dissenting). Accordingly, railroad crews have long been subject to government regulations which mandate certain acts and prohibit other practices.

In *Shoemaker v Handel*, 795 F.2d 1136 (3d Cir), *cert denied*, 107 S.Ct. 577 (1986), the appellate court decision which most carefully considered warrantless drug testing in a pervasively regulated industry, the Third Circuit held that the administrative search exception extended to warrantless drug and alcohol testing of employees in the heavily regulated horseracing industry. The Third Circuit reasoned in *Shoemaker* that "public confidence forms the foundation for the success of an industry based on wagering." 795 F.2d at 1142. The court below conceded that "the railroad industry has experienced a long history of close regulation," including regulation as to railroad safety. *Railway Labor Executives' Ass'n v Burnley*, 839 F2d at 585. *Amici* believe that the public interest in assuring that the safety of the nation's railroad system is maintained is far more compelling than the public interest in assuring the integrity of the horse racing industry. The majority in the case below attempts to distinguish *Shoemaker* on the grounds that "jockeys, as the persons engaged in the regulated activity, are the principal regulatory concern." This misconstrues the central regulatory concern in *Shoemaker*, which was to protect the integrity of the horse racing industry by assuring scrupulous honesty in racing. Since jockeys ultimately control the animal on the racing field, they are a logical and legitimate focus of a search designed to discourage drug and alcohol abuse. Similarly, the regulations at issue focus, just as they do in *Shoemaker*, on those employees who are central to -- and ultimately influence and control -- the principal regulatory concern, *i.e.*, railroad safety.

b. Warrantless Inspections Are Necessary to Further the Regulatory Scheme

The warrantless inspections authorized by the FRA regulations are necessary to further the regulatory scheme. The testing requirement is applied only after major accidents or fatal incidents, or in the wake of serious rule violations involving significant risks of injury or property damage. Under the circumstances, the

inspections are necessary to carry out the purposes of the regulations. These include the deterrence of drug and alcohol abuse on-the-job by railroad employees, since detection is likely. They are also necessary to ascertain the cause of accidents and serious rule violations, a compelling interest of the railroads, the government and the public.

c. The Inspection Program Provides a Constitutionally Adequate Substitute for a Warrant

The testing program is spelled out in detail in the FRA regulations, offering an acceptable substitute for a warrant in terms of providing certainty and regularity of the search application. Railroad employees have ample notice as to the timing of the searches, and are aware that all employees involved in major accidents, fatal incidents, or significant rule violations must be tested. There is no possibility that arbitrary testing can occur. As the circuit courts in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir 1987), and *Shoemaker* concluded, urinalysis and blood tests are constitutionally acceptable as far as the criteria of certainty and regularity are concerned when conducted uniformly, or by lot. The same conclusion should be applied to post-accident testing and screening conducted after violations of rail safety rules.

Finally, the premise for the Court of Appeal's holding that the administrative exception is inapplicable to the FRA testing program -- *i.e.*, its conclusion that the actions of railroad workers are not the subject of extensive government safety regulation -- has been invalidated by recent federal legislation. The Rail Safety Improvement Act of 1988, P.L 100-342, a statute which is largely focused on safety-related activities of railroad workers, became law on June 22, 1988. That measure makes it illegal for train crews to tamper with safety devices, mandates a federal licensing system for rail engineers and establishes federal civil penalties against individual workers for safety violations. To the extent that the issue was previously uncertain (a point which the *amici* do not concede), it is now abundantly clear that individual railroad workers are subject to close regulation at the federal level which is focused on the same concerns which gave rise to the FRA testing programs: railroad safety and public safety. Accordingly, the Court

should hold that the challenged drug tests conducted under the FRA regulations fall within the category of warrantless searches of pervasively regulated industries that are constitutional.

II. DRUG TESTING OF TRANSPORTATION WORKERS UNDER THE FRA REGULATIONS IS REASONABLE

Under the Fourth Amendment, the reasonableness of a search is determined by whether the action was justified at its inception, and whether the search, as actually conducted, was reasonably related in scope to the circumstances which justified the interference in the first place. *New Jersey v T.L.O*, 469 U.S. 325, 341-42 (1985). *See also O'Connor v Ortega*, 107 S.Ct. at 1502-03. The *amici* believe that testing for drug and alcohol use of employees involved in major accidents, fatal incidents or rule violations (as defined in the FRA regulations) is both justified at its inception and reasonably related in scope to the circumstances justifying the interference.

a. The Searches Are Justified At Their Inception

The government has a compelling interest in assuring transportation safety. This is recognized both by the numerous FRA and Department of Transportation (DOT) safety regulations and by common law. For example, railroads are common carriers, and, as such, have been held to a high standard of care from the perspective of tort liability. It has been stated that:

> Common carriers, who enter into an undertaking toward the public for the benefit of all those who wish to make use of their services, must use great caution to protect passengers entrusted to their care; and this has been described as "the utmost caution characteristic of very careful prudent men," or "the highest degree of vigilance, care and precaution." Where the carrier receives goods for transportation, his responsibility is even higher, and the common law made him an insurer of their safety against all hazards except an Act of God and the public enemy.

Prosser and Keaton on Torts, 5th Edition, (W.P. Keaton et al., 5th ed. 1984), 208-209. Common carriers are generally liable for the negligent acts of their agents/employees in operating the transportation service, and must assure that employees operate transportation equipment in a safe and prudent manner.

Considering the high standard to which common carriers such as railroads are held, it is reasonable to require railroad employees involved in accidents, incidents, or certain rule infractions which present actual or potential safety hazards to themselves, to the public, to the property of railroads and their customers, and to the environment, to submit to drug and alcohol tests. As noted by the Seventh Circuit, "the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse." *Division 241 Amalgamated Transit Union (AFL-CIO) v Suscy*, 538 F.2d 1264, 1267 (7th Cir), *cert denied*, 429 U.S. 1029 (1976). If particularized suspicion is required before a railroad can lawfully test crew members for drug or alcohol use, the rail carrier's ability to determine the cause of accidents and near accidents is likely to be constricted severely.

The Court of Appeals erred in stating that a requirement of individualized suspicion "poses no insuperable burden on the government," *Railway Labor Executives' Association v Burnley*, 839 F.2d at 588, and betrays a lack of familiarity with the nature of transportation operations. In most modes of commercial transportation, including the railroads regulated by the instant testing provisions, workers are in transit and away from the scrutiny of supervisors for the vast majority of their working time. To require particularized suspicion in *every* instance for employees (such as through the specific personal observations of supervisors for "reasonable suspicion" testing under 49 C.F.R. § 219.301(c)(2) or comparable standards) will effectively eliminate testing in many circumstances. That result will have a negative impact on substantial governmental interests in transportation safety, *i.e.*, accident investigation and deterrence of drug use.

In striking down tests under the FRA regulations which are conducted in the absence of "particularized suspicion", the Ninth

Circuit observed that accidents, incidents or rules violations do not, by themselves, establish reasonable grounds to believe that a train crew, or even a single employee, will demonstrate impairment due to drugs or alcohol. Yet, the strict standard which the Court of Appeals would impose ignores this Court's recognition that particularized suspicion is not an irreducible minimum of a reasonable search. *New Jersey v TLO*, 469 U.S. at 342 n.8. Indeed, in certain limited circumstances, the balance of interests precludes insistence upon "some quantum of individualized suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976). This view has been correctly applied by the majority of appellate courts which have reviewed testing programs which did not require individualized suspicion prior to mandated testing.

While questioning the ability of certain tests to measure impairment and supply the required nexus to safety interests, the District of Columbia Circuit held that a school board could constitutionally administer drug tests during the course of a routine physical exam given to school transportation employees who have responsibilities for assisting children and assuring their physical safety. *Jones v McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), *petition for cert filed*, 56 U.S.L.W. 3739 (U.S April 15, 1988) (No. 87-1706). As noted in the court's decision:

> There can be no doubt whatsoever that the School System's mission of safely transporting handicapped children to and from school cannot be ensured if employees in the Transportation Branch are allowed to work under the influence of illicit drugs. Any suggestion to the contrary would be preposterous. The case law on this point is clear that a governmental concern is particularly compelling when it involves the physical safety of the employees themselves or of others.

833 F.2d at 340. Accordingly, the D.C Circuit found that the employer acted pursuant to a significant and compelling governmental interest in mandating the drug tests which were at issue in *McKenzie*.

Taking note of the fact that "the use of illicit drugs has had a pernicious impact on American society" by compromising the public's health, safety and security, the Fifth Circuit held that the Customs Service's program requiring employees seeking transfer to certain sensitive jobs to submit to urine testing was reasonable and constitutional. *National Treasury Employees Union v Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert granted*, No. 86-1879, 108 S.Ct. 1072 (1988). Finding that the government has a strong interest in filling key drug enforcement positions with individuals who are not drug users, the *Von Raab* court upheld the challenged testing program based on the scope of the privacy intrusion, the justification for the search and the manner in which the tests were administered.

In *McDonell v Hunter*, *supra*, the Eighth Circuit held that employees of the Iowa Department of Corrections who have regular prisoner contact could be subjected lawfully to urinalysis testing, either uniformly or by systematic random selection. Finding that drug use would affect the ability of corrections employees to safely perform their work and pose a real threat to the security of the prison, the appeals court held that the administration of limited testing was the only way in which this legitimate concern could be controlled in a satisfactory manner. 809 F.2d at 1308.

In *Shoemaker v Handel*, 795 F.2d 1136 (3d Cir), *cert denied*, 107 S.Ct. 577 (1986), the Third Circuit reviewed regulations adopted by the New Jersey Racing Commission which permitted officials to require jockeys to submit to breathalyzer and urine tests to detect alcohol or drug consumption. Finding that the state has a strong interest in assuring the pubiic of the integrity of persons engaged in the horse racing industry, the court in *Shoemaker* stated that frequent drug and alcohol testing is an effective means of demonstrating that such individuals are not subject to certain outside influences. 795 F.2d at 1142. Applying the warrantless administrative search exception (discussed previously in further detail), the Third Circuit held that the daily selection by lot of jockeys to be subjected to drug testing does not violate the Fourth Amendment.

In the case involving the closest factual setting to that of the instant proceeding, *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*, *supra*, the Seventh Circuit upheld a drug and alcohol testing program for drivers employed by the Chicago Transit Authority who were involved in serious accidents. Even where the employer possessed no specific knowledge about the condition of an employee subject to such testing (apart from his involvement in a serious accident), the court found that the transit agency had a "paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs." 538 F.2d at 1267.

Particularized suspicion was not a necessary prerequisite to finding such tests constitutional in any of these cases, in which reviewing courts weighed the government interest in conducting such searches against the intrusion. The *amici* submit that these appellate courts applied an appropriate standard to drug and alcohol testing programs in diverse settings. The *amici* further note that the public interest in railroad safety is at least as compelling as those interests found to justify drug tests without individualized suspicion in *McKenzie*, *Von Raab*, *McDonell*, *Shoemaker* and *Suscy*. Accordingly, the *amici* submit that the Ninth Circuit erred in concluding that the searches authorized under the FRA regulations are not justified at their inception.

b. The Searches Are Reasonably Related In Scope To The Circumstances Justifying The Intrusion

The court below did not specifically decide the issue of whether the searches authorized by the FRA regulations are reasonably related in scope to the circumstances which justify the interference in the first place, absent particularized suspicion. Instead, the Court of Appeals determined that the regulations would be reasonable in scope if amended to incorporate a particularized suspicion requirement. *Railway Labor Executives' Ass'n v Burnley*, 839 F.2d at 588. The *amici* believe that the test regulations as presently constituted are reasonable in scope for a number of reasons.

The FRA regulations permit toxicological tests to be conducted in the absence of particularized suspicion of impairment only in narrowly defined circumstances. The first is in the wake of "major accidents," defined as those involving a fatality, a release of a hazardous material accompanied by an evacuation, a reportable injury resulting from the release, or substantial damage to railroad property. The second is after an "impact accident" resulting in either a reportable injury or property damage in excess of $50,000. The third involves a fatal train incident, defined as one involving a fatality to any on-duty railroad employee. In addition, the fourth circumstance in which employee toxicological testing may be mandated under the rule is when an employee has been involved in certain rule infractions which present substantial safety hazards to persons and property. Thus, only where substantial actual injury to persons or property has occurred, or when potentially serious and life-threatening rule violations have taken place, are these searches authorized. Accordingly, the circumstances under which these searches may be conducted and the scope of the searches are well-defined in the regulations.

There is no leeway for arbitrary application of the testing requirements by supervisory or medical personnel. *See National Treasury Employees Union v Von Raab*, *supra*. Under the FRA rules, tests are given uniformly to all employees directly involved in an accident or incident, including, where appropriate, dispatchers and signal maintainers as well as members of the operating crew. *See M:Donell v Hunter*, *supra* (upholding uniform or systematic random testing of prison personnel having regular contact with prisoners). The FRA regulations mandate that the searches be conducted at medical facilities, and the regulations specifically provide that physicians retain the discretion to determine whether or not drawing a blood sample is consistent with the health of an injured employee or an employee otherwise afflicted by any other condition which may preclude such an act. 49 C.F.R. § 219.203(e). The regulations incorporate special provisions to assure that samples are kept intact and shipped promptly, *see* 49 C.F.R. § 219.205, and employees have an opportunity to respond in writing to the results of the toxicological tests prior to the

preparation of any final investigation report concerning the accident or incident, *see* 49 C.F.R. § 219.211(a)(2). These safeguards are designed to limit the scope of the searches to assure their reasonableness.

Given the public health and safety concerns involved in these accidents, incidents and rule violations, the documented link between such events and substance abuse, and the government's interest in investigating the cause of these serious occurrences, the testing program must be deemed to reasonably relate to the circumstances justifying the testing, *i.e.*, assuring increased railroad safety by deterring on-the-job use of drugs and alcohol.

III. PUBLIC SAFETY INTERESTS IN CONTROLLING DRUG USE AMONG RAILWAY PERSONNEL OUTWEIGH THE NEED TO PROTECT PRIVACY INTERESTS

The court below properly concluded that adherence to a warrant requirement as a prerequisite for conducting these tests was not necessary. *Railway Labor Executives' Ass'n v Burnley*, 839 F.2d at 582. The court erred, however, in concluding that such searches were unreasonable, solely because a showing of "particularized suspicion" is not required in every case prior to testing. Normally, the standard of reasonableness applicable to a particular class of searches requires balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. *O'Connor v Ortega*, 107 S.Ct. at 1499. In the case of the FRA regulations, this determination of reasonableness requires weighing the railroad employees' reasonable expectations of privacy against the government interest in the safe and efficient operation of the railroads for the benefit of railroad employees, passengers, customers and the general public.

The governmental interest in this case is clear. In the Federal Railroad Safety Act of 1979, 45 U.S.C. (& Supp. III) § 421, *et seq.*, Congress directed and authorized the Secretary of Transportation to adopt those rules, regulations, orders and standards which are

necessary for railroad safety.[3] In a rulemaking which found that alcohol and drug use is sufficiently common to pose a significant safety problem, FRA determined that impairment of railroad workers due to such substances constituted causal or contributing factors in a number of train accidents and employee fatalities. 48 Fed. Reg. 30723, 30726 (1983). To combat this documented role of worker impairment due to alcohol and drugs, the FRA promulgated extensive toxicological testing requirements. Designed to "prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs", 49 C.F.R. § 219.1(a), the FRA regulations mandate testing in some circumstances (Subpart C) and authorize testing in other cases (Subpart D).

The agency's action in mandating tests in some circumstances in which individualized suspicion is not present was made necessary by the fact that symptoms of drug use are often undetectable by even a reasonably trained supervisor. Some "functional" drug users are able to avoid job-related problems for lengthy periods until their habits or practices reach a crisis stage. Accordingly, drug tests of transportation workers allow for more complete and accurate analysis of the cause of accidents and casualties, and they serve as a deterrent to drug use.

Balanced against this compelling public safety interest is a limited intrusion on the individual worker for the purpose of obtaining and analyzing certain body fluid samples. The FRA regulations establish a system through which employees can expect testing on the occurrence of specified events (*e.g.*, accidents or rules violations). In other circumstances, protections limit unreasonable or arbitrary designation for testing, such as limitations on "reasonable suspicion" tests to circumstances in which supervisors have personally observed questionable behavior, 49 C.F.R. § 219.301(c)(2). Various provisions of the rule limit the time frame

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[3] As noted previously, this governmental interest has been reinforced by the enactment of the Rail Safety Improvement Act of 1988, P.L 100-342 (June 22, 1988).

in which tests are to be administered, the facilities and individuals who will conduct tests, as well as the scope of testing.

This limited intrusion takes place within the context of the explicit notice (provided by the regulations) that a drug test might be required of the individual worker in narrow, specified circumstances. This prior warning has the effect of reducing the legitimate privacy expectations of employees engaged in covered railroad activities. Those who remain employed in operational capacities do so with the knowledge that a body fluid sample may be required. Workers who find this condition of employment sufficiently objectionable are free to terminate their employment relationship with the railroad or seek transfer to a position that is not covered by the testing rule.

"[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Schmerber v California*, 384 U.S. 757, 768 (1966). Here, the Congressionally mandated mission of FRA and the compelling public interest in safe transportation establish a clear justification for the tests which are at issue. *Amici* submit that the constitutional balancing test requires the conclusion that the Fourth Amendment is satisfied and that the Court of Appeals should be reversed.

CONCLUSION

For the foregoing reasons, the searches authorized by the FRA regulations are not only reasonable under generally recognized principles as outlined above, but can also be upheld on the basis that they fall within the administrative search exception for pervasively regulated industries. Accordingly, the decision of the Court of Appeals should be reversed and the FRA toxicological testing regulations upheld.

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